Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
CLERK

89-1692

In The

Supreme Court of the United States

October Term, 1989

UNITED STATES OF AMERICA,

Appellee,

-against-

SALVATORE T. D'OTTAVIO,

Petitioner-Appellant.

PETITION FOR A WRIT OF CERTIORARI FROM THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. Was the Petitioner denied the effective assistance of counsel at trial?

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TO THE HONORABLE, THE CHIEF JUSTICE, AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Petitioner-Appellant, Salvatore T. D'Ottavio respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit rendered on January 31, 1990, which denied a petition for a

rehearing, following the affirmance of the conviction of Appellant Salvatore T. D'Ottavio for false declarations before a grand jury, in violation of Title 18 U.S.C. § 1623.

OPINION BELOW

After indictment, Petitioner pleaded not guilty and in June, 1988 proceeded to trial before the Honorable John E. Sprizzo and a jury. Petitioner was convicted of six counts charging making false declarations to a federal grand jury in violation of Title 18 U.S.C. Section 1623.

The Judgment of Conviction was affirmed by the Court of Appeals for the Second Circuit in a determination filed on September 20, 1989.

Petitioner's *Pro Se* petition for a re-hearing was denied by the Court on January 31, 1990.

The opinions of the Court of Appeals were not officially reported. The summary orders issued by the Court are set forth in the Appendix.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit denying a rehearing was entered on January 31, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Constitutional provision involved in the case at bar is the Sixth Amendment to the United States Constitution.

STATEMENT OF THE CASE

An indictment was filed on March 13, 1987 charging Petitioner with eleven counts of making false statements to a federal grand jury investigating the activities of the alleged Bonnano organized crime family, in violation of Title 18, United States Code, Section 1623.

The basis for the indictment is found in Petitioner's grand jury testimony in the Southern District of New York nearly five years earlier. At trial the Government offered portions of this testimony, alleging that Petitioner lied when he testified before said grand jury that he was not a member of the alleged Bonnano family, that he did not know about its "business," that he did not know whether other individuals including Dominick Napolitano and Joe Puma were members, that he did not know other people including Alphonse Indelicato, that he never had any "business dealing" with Napolitano, and that he went to Florida with his wife solely for a vacation, the trip having nothing to do with Napolitano.

The chief witness against Petitioner was an Agent of the Federal Bureau of Investigation named Joseph Pistone. Pistone, using the name "Donald Brasco" had succeeded in infiltrating the Bonnano family. It was Pistone's testimony and conversations he had surreptitiously recorded while undercover that formed that entire case against Petitioner.

Petitioner was convicted following a five-day jury trial of five counts of making false statements to the grand jury. It is Petitioner's contention that numerous mistakes made by trial counsel in his preparation and performance at trial, particularly in his examination of Pistone, was the cause of his conviction.

REASON FOR GRANTING THE WRIT

PETITIONER SALVATORE T. D'OTTAVIO WAS DENIED HIS CONSTITUTIONAL RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL.

The facts in this case compel the conclusion that Petitioner was deprived of a fair trial because of the ineffectiveness of his original counsel which permeated the entire proceedings. The record demonstrates beyond question that counsel's performance was "deficient" and that "the deficient performance prejudiced the defense." *Strickland v. Washington,* 466 U. S. 668, 687, 104 S. Ct. 2052 (1984); *Darden v. Wainright,* 477 U. S. 168, 184-186, 106 S.Ct 2464 (1986). The mistakes by counsel at trial were substantial. Numerous instances, many of which are enumerated below, establish that counsel's performance was so inept that but for his errors the result would have been different, with Petitioner being adjudged not guilty of all charges brought against him. These errors included the following:

1. Counsel failed to object when twice during the Government's summation it was stated that D'ottavio was a member of the Bonnano crime family despite the fact that the Court dismissed the Count accusing Petitioner of lying about his membership in said group, on the ground that there was insufficient evidence to support the accusation. (TR. 422, 470, 472).

2. Counsel failed to cross-examine Pistone on how he could harmonize his trial testimony that, in apparent furtherance of the alleged conspiracy to kill Bruno Indelicato, once in Florida he could "call on Sal" if he needed help, with his other testimony that he did not know how to contact D'ottavio (TR. 385, 386).

3. Counsel further failed to cross-examine Pistone on the presence of any reference whatsoever to his statement that he could "call on Sal" once in Florida, in either his grand jury testimony, or any of his FBI 302 forms.

4. Counsel failed to cross-examine Pistone concerning the contradiction between his testimony at trial that D'ottavio was not going to help him locate Indelicato in Florida, and his 1981 Grand Jury testimony that he was to help locate him (TR. 385, Grand Jury, November 4, 1981, 31).

5. Counsel failed to object when during the Government's summation, it was stated that D'ottavio was sent to Florida "to find someone" (Indelicato, in order to facilitate Pistone's assassination of him) when Pistone testified that D'ottavio was *not* sent to find Indelicato (TR. 385, 504).

6. When it was established on cross-examination that the physical description Pistone was given of Bruno Indelicato was completely inaccurate,

counsel failed to use this revelation to develop the implausibility of Pistone's testimony that he was sent to Florida to kill an ill-described individual (TR. 343).

7. Counsel failed to cross-examine Pistone on the apparent contradiction between his trial testimony that the name "Bruno" was never mentioned during his conversation with Petitioner and Dominick Napolitano at the Motion Lounge during the evening of May 14, 1981 and his November 4, 1981 Grand Jury testimony that the name "Bruno" was mentioned (TR. 341, Grand Jury, November 4, 1981, 31).

8. Counsel failed to cross-examine Pistone on the contradiction between his trial testimony that he was not wearing a recording device on the evening of May 14, 1981 when in conversation with D'ottavio and his testimony at an earlier related trial that "I was wired up the whole 14th" (TR. 384, *United States v. Ruggiero,* TR. 1496).

9. Counsel failed to ask for either a mistrial or to have all testimony stricken from the record regarding D'ottavio's alleged membership in the Bonanno crime family, after the Court dismissed the third count of the indictment, accusing Petitioner of lying about said membership for want of sufficient evidence. (TR. 422).

10. Counsel failed to cross-examine Pistone on the contradiction between his trial testimony that an FBI form 302 concerning the events of May 14, 1981 was prepared "that evening," and the contents of the form itself which indicate it was first dictated on May 20, 1981 (TR. 326).

11. Counsel failed to ask Pistone about the contradiction between his trial testimony that Steven Marucca didn't want "Rossi" (actually another FBI undercover Agent) at the table in a restaurant in Florida during a meeting, and the statement in his published book My Life in the Mafia, that D'ottavio wanted Rossi away from their conversation (TR. 343, My Life in the Mafia, pp. 150-151).

12. Counsel failed to object when during the Government's summation, the prosecutrix stated that Petitioner had spoken to Lefty Ruggiero and was told that "we were winners and that there was one situation that remained to be taken care of...," (meaning, Bruno Indelicato had to be killed) when the actual testimony at trial was that the conversation was between Pistone and Ruggiero (TR. 76, 456).

13. Counsel failed to establish during cross-examination of Pistone that the murders of Alphonse Indelicato, Philip Giaccone and Dominick Trinchera had been solved, with the alleged perpetrators brought to trial, thereby

removing the suggestion that the killers were still at large, and that Petitioner was in some way involved.

14. Counsel failed to submit any request to charge whatsoever following the conclusion of the evidentiary stage of the trial (TR. 200, 431).

15. Counsel failed to establish the presence of Tony Rossi at the Motion Lounge on May 14, 1981 and, at the same time, establish that the voice heard and identified as Petitioner's during conversations recorded that day, was actually Rossi's (TR. 85, 86, 196).

16. Counsel failed to object when Pistone testified that Petitioner was identified to him as a loanshark, alleged "other crime" evidence totally irrelevant to any issues of the trial (TR. 146, 147).

17. Counsel failed to attempt to neutralize the prejudicial effect of Pistone's statement that Petitioner was a loanshark, by showing that no mention of the characterization was made in the FBI form 302 prepared by Pistone encompassing the day this statement was alleged to have been made.

18. Counsel never pursued the Court's pre-trial invitation to identify the portions of the tapes he felt were inaudible, and seek exclusions via an audiblity hearing, particularly when counsel

knew that these very same tapes were found to be inaudible during the earlier Ruggiero trial.

19. Counsel failed to enter into evidence at the District Court level, relevant documents including, *inter alia*, Petitioner's entire grand jury testimony, relevant portions of the transcript of the *United States against Ruggiero,* and a copy of Joseph Pistone's book, My Life in the Mafia.

20. Counsel never attempted to call as a witness for the defense any of the other persons present at the Motion Lounge on May 14, 1981, including FBI Agent Edwin Robb ("Tony Rossi").

21. Counsel failed to recall Special Agent Charles Greco to complete cross-examination with regard to any changes that had to be made on transcripts of relevant conversation that he prepared. (TR. 192).

22. Counsel failed to cross-examine Pistone regarding his testimony that the May 14, 1981 recorded conversation occurred in the backroom of the Motion Lounge, when the noise on the recording of a pinball machine located some seventy feet from that room, in the front of the bar, proved his placement of the conversation, impossible.

23. Despite the fact that counsel was attorney of record for fifteen months, he never asked the Government for an opportunity to listen to and examine the original recording of the May 17, 1981 taped conversation.

24. Counsel failed to object when the Prosecutrix, in successfully seeking to admit photographs including photographs of Lefty Ruggiero and Dominick Napolitano, erroneously claimed that Petitioner had testified before the grand jury that he did not know either individual, when Petitioner did in fact testify he knew Napolitano and was never asked about Ruggiero (TR. 10).

25. Counsel failed to object when the Prosecutrix repeatedly misstated Petitioner's grand jury testimony during her reading to the jury, including her suggestion that Petitioner's membership in the Bonnano crime family was a "fact" (TR. 400).

26. Counsel failed, and admitted at trial, that he failed to review all 3500 materials prior to his cross-examination of Joseph Pistone (TR. 105-106).

27. With regard to Count Ten of the Indictment, defense counsel failed to establish that the alleged perjurious answer--"I don't recall discussing that, no"--to the question whether Petitioner ever had "a discussion with Sonny

Black about Bruno," was in actuality a truthful answer to an entirely different question that was asked in the grand jury, *i.e.*, whether there were ever any discussions with Petitioner about "trying to find Bruno Indelicato." (Grand Jury Testimony, March 15, 1982, 47, 79-89).

28. Counsel failed to obtain the precise date of the presentation of evidence to the grand jury of the case against Petitioner, thereby preventing a meaningful determination of whether his right to a speedy trial was infringed.

"The right to counsel is the right to the effective assistance of counsel" *McMann v. Richardson*, 397 U. S. 759, 771 n.14, 90 S.Ct. 1441, 1449 n. 14 (1970). And, "[t]he benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. *Strickland v. Washington supra*, 446 U. S. at 686; 104 S. Ct. at 2064. Such was the case here, with counsel's failure to subject the Government's case to "meaningful adversarial testing, resulting in denial of Petitioner's Sixth Amendment Rights" *United States v. Cronic*, _____ U. S._____, 104 S. Ct. 2039 (1984)

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Appendix A
Order of the United States Court of Appeals for the Second Circuit, Entered September 20, 1989

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of September, one thousand nine hundred and eighty-nine.

Present:

Honorable Ralph K. Winter,
Honorable Roger J. Miner,
Honorable Frank X. Altimari,
Circuit Judges.

UNITED STATES OF AMERICA,
Appellee,

v.

SALVATORE D'OTTAVIO,
Defendant-Appellant.

ORDER
No. 89-1061

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed.

Filed: September 20, 1989 **Issued as Mandate: February 14, 1990**

Appendix B

Order Denying Pro Se Petition For a Rehearing of The United States Court of Appeals For The Second Circuit, Entered January 31, 1990

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the thirty-first day of January, one thousand nine hundred and ninety.

UNITED STATES OF AMERICA,

Appellee,

DOCKET NUMBER 89-1061

v.

SALVATORE T. D'OTTAVIO,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having filed herein by appellant pro se

SALVATORE T. D'OTTAVIO,

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Filed: January 31, 1990

ELAINE B. GOLDSMITH
Clerk